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In The
Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw*

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs, and these letters are on file with the Clerk.

v. Reno, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

Substantial evidence amply supports the District Court's finding that Virginia's Third Congressional District was the product of a racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630 (1993), and represented the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 52 U.S.C. § 10301(c). The legal framework set forth in *Miller v. Johnson*, 515 U.S. 900 (1995), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), calls for affirmance of the District Court's conclusions that racial considerations were the Legislature's predominant concerns in creating the Third Congressional District triggering strict scrutiny, and that the design of the Third Congressional District did not withstand strict scrutiny because it was not narrowly tailored to achieve compliance with Section 5 of the Voting Rights Act.

This case requires only a straightforward application of *Miller* and *Alabama* to the facts and demonstrates that the Court's framework established in those cases remains clear and workable. The fact that members of the Virginia General Assembly charged

with redistricting announced a target of 55 percent for the African American share of the voting age population in redrawn District 3 is relevant but not conclusive evidence with respect to the threshold question of whether District 3 should be subject to strict scrutiny, as the district court correctly concluded.

Under the *Miller* and *Alabama* framework, redistricting plans that subordinate traditional districting principles in favor of racial considerations are subject to strict scrutiny. Evidence that traditional districting principles were subordinated is drawn first from an objective review of the challenged district's shape, compactness, contiguity, and demographic makeup. Courts may further consider evidence of legislative purpose, such as statements in the legislative record and post hoc testimony, in order to assess the extent to which the disregard for traditional districting principles is causally related to racial considerations.

The objective, geographic and demographic evidence before the District Court overwhelmingly showed that race was the predominant consideration contributing to the "odd shape" of the Third Congressional District. This evidence included the "disparate chain" of predominantly African American communities "loosely connected" by the James River but not contiguous by land; the undisputed fact that the District was the least "compact" Congressional District in Virginia; and the conspicuous lack of respect for political subdivision boundaries shown by splitting nine counties or cities. This objective evidence,

together with various statements by the legislation's sole author that race was "nonnegotiable," the "primary focus" and "one of the paramount concerns" in drawing the Third Congressional District was to avoid "retrogression," demonstrated that the contortions of District 3 were not just the product of ordinary partisan concerns, and led the District Court to the inescapable conclusion that race was *the* predominant factor behind the Third Congressional District's design, achieved by subordinating traditional race-neutral districting principles.

The ample objective, geographic evidence of racial gerrymandering here makes it unnecessary for the Court to reach the question left open in *Alabama* of whether a legislature's decision to set a minority population target when redistricting by itself triggers strict scrutiny. *See Alabama*, 135 S. Ct. at 1272. This Court has *never* applied strict scrutiny solely based upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama*, 135 S. Ct. at 1272 (citing *Bush v. Vera*, 517 U.S. 952, 996 (1996)); *Shaw*, 509 U.S. at 649.

This is consistent with the Court's jurisprudence distinguishing election districts that are racial classifications, from those that show only routine legislative considerations, because an election district's minority percentage is not mathematical evidence that its boundaries are distorted by racial considerations. Rather, it is the *implementation* of the State's racial target policy, and not that the State had targets

ab initio, that ultimately determines whether particular districts are racial classifications. The operative factors that may trigger strict scrutiny, either individually or collectively, are whether a given district exhibits widely dispersed pockets of minority populations, highly irregular district boundaries, and/or extensive splits of political units. *See id.* at 645 (12th Congressional District in North Carolina). However, the mere fact that a state set a population target for a district is not a basis for subjecting that district to strict scrutiny, if the challenged district does not offend traditional districting principles, *i.e.*, so long as the district unites a reasonably compact and contiguous minority population along local political boundaries, and the district is not dramatically irregular in its overall shape. It is the subordination of traditional districting principles, causally linked to racial considerations, which the Court subjects to strict scrutiny. There is no reason to conclude that establishing specific numerical targets is *per se* incompatible with traditional districting principles or that the resulting plan will suffer in any way.

This Court's precedents in *Miller* and *Alabama* provide an effective framework for analyzing the facts in this case, and the District Court's factual findings are fully supported by this record. Accordingly, the District Court's decision should be affirmed under the existing *Miller* and *Alabama* framework.

ARGUMENT

I. *MILLER* AND *ALABAMA* PROVIDE CLEAR AND ENFORCEABLE STANDARDS FOR THIS CASE

This Court has repeatedly recognized that the framework first announced in *Miller v. Johnson*, 515 U.S. 900 (1995) is the touchstone for determining when state electoral districting plans trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Alabama Legislative Black Caucus*, 135 S. Ct. at 1264; *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*"); *Vera*, 517 U.S. at 958. This framework remains a viable and effective standard for enforcing the Fourteenth Amendment's guarantee against racial discrimination in the realm of redistricting, and this Court need not depart from it.

The Equal Protection Clause prohibits states from classifying citizens by race, including adopting electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw*, 509 U.S. at 645. To demonstrate that a district violates the Equal Protection Clause, a plaintiff must first show that race was the predominant factor in how the legislature drew district lines. *Miller*, 515 U.S. at 915. If a plaintiff makes this showing, the Court then employs its "strictest scrutiny" to determine whether the redistricting plan was narrowly tailored to further a compelling state interest. *Id.*

In determining whether racial considerations predominated, the constitutional inquiry begins with an objective spatial analysis of the district and its minority population. The analysis includes considering the compactness and dispersal of the minority population within a district, such as whether it is connected by artifices such as land bridges or relies on point contiguity that would not normally be employed. *See Shaw*, 509 U.S. at 646; *Miller*, 515 U.S. at 917. The analysis also includes looking for patterns of racially-correlated splitting of political units that are normally kept intact. *See Bush*, 517 U.S. at 974. In short, the analysis begins by determining whether the geography of the challenged district appears to be a racially-identifiable departure from what would normally be expected from a compact and contiguous district, and whether something has distorted the district's configuration along racial lines.

The analysis starts with these objective factors because "reapportionment is one area in which appearances do matter." *Shaw*, 509 U.S. at 647. In some cases, this objective inquiry is enough to demonstrate that a state engaged in an unlawful racial gerrymander. *See id.* at 646-47 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). In many cases, however, the analysis requires looking into the legislative process to see if racial considerations are responsible for the district's configuration. This inquiry searches for any contemporaneous statements of legislative purpose and post hoc testimony suggesting that race played

an undue role in districting decisions. *See Miller*, 515 U.S. at 917-18.

The structure of the *Miller/Alabama* test is faithful to this Court's general framework for discerning when facially neutral laws have a discriminatory purpose in violation of the Fourteenth Amendment. *See Shaw*, 509 U.S. at 643 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) ("*Arlington Heights*")). When searching for an invidious discriminatory purpose, "[t]he impact of the official action – whether it 'bears more heavily on one race than another[ ]' . . . – may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). After analyzing the objective impact of a law, courts consider other evidence, including "legislative or administrative history . . . especially . . . contemporary statements by members of the decision making body." *Arlington Heights*, 429 U.S. at 268. Therefore, inquiries into whether a facially-neutral state action – redistricting or otherwise – was motivated by unjustified racial considerations begin with an objective analysis before probing the legislative record for indicia of improper purpose.

Accordingly, courts "do not view any of [*Miller*'s] factors in isolation." J.S. App. at 16a.[2] On their own, statements of supposed legislative purpose and post hoc

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[2] "J.S. App." refers to the Appendix attached to the Appellants' Jurisdictional Statement.

testimony about the legislative process neither prove nor disprove whether traditional districting principles – like compactness, contiguity, and respect for political subdivisions – were improperly subordinated to racial considerations. In addition, contemporaneous legislative statements are often self-serving and disingenuous, and obtaining post hoc evidence may be difficult. *See Arlington Heights*, 429 U.S. at 268. However, when coupled with other evidence that traditional districting principles were disregarded, legislative statements and post hoc testimony can illuminate whether traditional districting principles were compromised for racial reasons.

Evidence that a state set a minority population target for a district may be one consideration in finding that race was causally related to a departure from traditional districting principles. But it would short-circuit *Miller*'s carefully constructed analytical framework to treat a population target as a racial classification *per se*. When a state professes to target a majority-minority district generally (a district with a 50 percent or greater minority population) or a specific percentage (as in this case), there is no reason to conclude that those goals are incompatible with traditional districting principles or that the resulting plan will suffer in any way. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40 percent minority target might require extensive geographic contrivances in one region, whereas in another region a 60 percent minority district could be the natural result of following traditional districting principles to the letter. In other regions, a state might have to violate traditional districting principles in order to *prevent* the creation of a 75 percent minority district. Needless to say, a district with a 70 percent minority population does not necessarily involve twice the racially driven boundary manipulations of a 35 percent minority district; neither figure in and of itself indicates that any unusual boundary manipulations occurred.

When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are just districts. There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.

During the redistricting process, any state with a sizable minority population will assuredly be aware of the racial consequences of its boundary changes, particularly where the racial composition of its districts has a predictable and substantial electoral

impact. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). It is simply unrealistic to expect that prohibiting states from acknowledging racial compositions in their redistricting decisions will prevent states from ever being aware of the racial impact of these decisions. Because states will unavoidably be aware of this impact, treating evidence of population targets as a *per se* racial classification would ultimately lead states to rely even more upon subterfuge and opacity in the redistricting process.

This Court never has applied strict scrutiny solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama Legislative Black Caucus*, 135 S. Ct. at 1272 (citing *Vera*, 517 U.S. at 996); *Shaw*, 509 U.S. at 649. Rather, strict scrutiny may be triggered by individual or collective objective facts such as whether the district exhibits widely dispersed pockets of minority population, highly irregular district boundaries, and extensive splits of political units. *See Shaw*, 509 U.S. at 645 (12th Congressional District in North Carolina); *Shaw*, 517 U.S. 899 (1996) (same); *Cromartie II*, 532 U.S. 234 (same); *United States v. Hays*, 515 U.S. 737, 741-42 (1995) (2nd and 4th Congressional Districts in Louisiana); *Miller*, 515 U.S. 900 (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush*, 517 U.S. 952 (18th,

29th and 30th Congressional Districts in Texas). *See also King v. Illinois State Bd. of Elections*, 522 U.S. 1087 (1998) (summarily affirming three-judge court decision concerning 4th Congressional District in Illinois).

The *implementation* of the state's target policy, and not the fact that the state had targets *ab initio*, ultimately must determine whether particular districts are racial classifications. That a state set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles. For example, a state that sets a 55 percent "target" for a majority-minority district does not trigger strict scrutiny, so long as the district unites a reasonably compact minority population along local political boundaries, and the district is not dramatically irregular in its overall shape.

It is the subordination of traditional districting principles, causally linked to racial considerations, that the Court has subjected to strict scrutiny. *See Miller*, 515 U.S. at 917. The districts that have been subjected to strict scrutiny under *Shaw* had the following common elements: they achieved a majority-minority population percentage by (a) uniting widely-separated minority population concentrations using geographical contrivances such as "land bridges," narrow fingers, wings or other unusually-shaped appendages or connectors that distorted the perimeter of the district, and/or (b) they split numerous political units such as counties, cities or voting precincts in a

racially disparate way. *See Bush*, 517 U.S. at 974; *Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. 630. In no case has this Court held that the goal of creating a majority-minority district *ipso facto* constitutes a racial gerrymander that requires strict scrutiny.

If a population target alone were sufficient to trigger strict scrutiny, this would tend to become an all-inclusive tautology. Because actors are assumed (outside the criminal context) to intend the consequences of their voluntary actions, and multitudes of district configurations are typically available, any district with a sizable minority population could be viewed as having resulted from an attempt to meet a target, regardless of whether it was explicitly identified as such. It would be difficult to identify a principled distinction in this regard between a district drawn with a 35 percent minority population, for example, versus a 45 percent or 55 percent minority population. It cannot be the Court's intent to make every district with a sizable minority population subject to strict scrutiny, a conclusion that would invite endless and unnecessary constitutional litigation over the racial composition of electoral districts. Nor does it make sense to force states to engage in a charade in which they are discouraged from disclosing their genuine redistricting criteria. *Shaw* explicitly acknowledged that officials inevitably are aware of race when they redistrict, and that such awareness is not on its own of constitutional import. *See Shaw*, 509 U.S. at 646 ("[T]he legislature always is *aware* of race when it draws district lines. . . . That sort of race

consciousness does not lead inevitably to impermissible race discrimination.") (emphasis in original).

Here, Virginia legislators identified a particular minority population percentage as a redistricting target for the Third Congressional District, but this alone did not establish that the Legislature subordinated traditional race-neutral districting principles to racial considerations. Rather, it was evidence of the District's odd shape, lack of contiguity, and exceptionally high number of local precinct splits, corroborated by testimony that race was a singular "nonnegotiable" redistricting criterion for the Legislature, that indicated that race predominated over traditional districting principles, as the District Court found. *See* J.S. App. 21a-27a.

The *Miller/Alabama* test strikes a careful balance that furthers the Fourteenth Amendment's guarantee of fair political participation free of unjustified racial classification while adhering to judicial respect for state legislatures undertaking the difficult task of redistricting. This framework remains an effective safeguard of constitutional rights, and this Court need not expand the circumstances under which an electoral district must be subjected to strict scrutiny.

II. *MILLER* AND *ALABAMA* PROVIDE ADEQUATE GUIDANCE TO STATE LEGISLATURES AND DISTRICT COURTS

Not only do the standards set down in *Miller* effectively balance liberty and federalism values, but

state legislatures have also internalized them in their redistricting processes. States have had little trouble following the set of rules laid down by *Miller*. The post-2000 redistricting cycle in fact generated hardly any *Shaw* litigation of note, because states were careful not to redistrict in a way that would run afoul of *Shaw* and *Miller*.

Alabama, 135 S. Ct. 1257, announced last term, was only the second *Shaw* claim that this Court has reviewed on the merits since *Cromartie II*. In *Alabama*, the Court clarified that maintaining population equality across districts is a background constitutional requirement, and not a traditional districting principle for purposes of the *Miller* test. *See id.* at 1270-71. The Court also explained that a racial gerrymandering claim "applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Id.* at 1265. While the District Court majority erred in *Alabama*, there is no indication that other district courts have been unable to properly apply the *Miller* factors.

In the original lower court proceedings in *LULAC v. Perry*, 548 U.S. 399 (2006), the District Court evaluated the plaintiffs' *Shaw* claim and found that the challenged district did not constitute a racial gerrymander. *See Session v. Perry*, 298 F. Supp. 2d 451, 513 (E.D. Tex. 2004) (vacated on other grounds). While this Court found that Texas's redistricting plan violated Section 2 of the Voting Rights Act, it did not reverse the District Court's ruling on the plaintiffs' *Shaw* claim. *See LULAC*, 548 U.S. at 442.

No departure from the *Miller/Alabama* test is required in this appeal. When the *Miller/Alabama* test is applied to the District Court's findings, the evidence shows that racial considerations predominated over traditional districting principles. *See infra* § III. Given the paucity of *Shaw* claims arising out of recent redistricting cycles and the relative ease with which lower courts have evaluated such claims, there is no reason for the principles of *Miller* or *Alabama* to be revisited or reformulated.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE THIRD CONGRESSIONAL DISTRICT WAS SUBJECT TO STRICT SCRUTINY UNDER *MILLER*

The District Court correctly found that race was the predominant factor in how the Legislature drew the Third Congressional District. The District Court's review of the evidence regarding the Third Congressional District substantially supported its finding that Virginia subordinated traditional districting principles to racial factors. There is no basis for arguing that the District Court's findings were clearly erroneous.

A. The Evidence Shows Subordination of Traditional Districting Principles.

The District Court analyzed the Third Congressional District under the proper standard, as stated

in *Shaw* and *Miller*. In *Miller*, this Court explained that:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

J.S. App. at 15a (citing *Miller*, 515 U.S. at 916).

Here, a simple glance at the Third Congressional District clearly indicates that it is the product of racial gerrymandering. *See Karcher v. Daggett*, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) ("[a] glance at the [congressional] map shows district configurations well deserving the kind of descriptive adjectives . . . that have traditionally been used to describe acknowledged gerrymanders.") (citation omitted). As the District Court described it, the Third Congressional District has "an odd shape and a composition of a disparate chain of communities, predominantly African American, loosely connected by the James River." J.S. App. at 25a. A deeper analysis of the compactness, contiguity, and the political

subdivisions of the Third Congressional District makes it all too clear that the Virginia Legislature subordinated traditional districting criteria to race.

First, the District Court correctly found that the Third Congressional District was non-compact and "bizarrely shaped." *Id.* at 36a; *see also* Appendix A. The District Court noted that Delegate William Janis, the architect of the redistricting, "'didn't examine compactness scores' when drawing the 2012 congressional maps." J.S. App. at 24a (quoting Pls.' Trial Ex. 14, at 8). Even the defendants' expert agreed that "the three primary statistical procedures used to measure the degree of compactness of a district all indicate that the Third Congressional District is the least compact congressional district in Virginia." *Id.* at 25a (citing Trial Tr. 375:21-24, 376:9-13). As a result, it is essentially undisputed that the Third Congressional District is non-compact. *Id.* ("Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District.")

The absence of contiguity in the Third Congressional District was also largely undisputed. As the District Court correctly observed, the Third Congressional District is contiguous in the legal sense only. *See id.* at 26a ("While the Third Congressional District is not contiguous by land, it is legally contiguous because all segments of the district border the James River."). In reality, the Third Congressional District consists of geographically dispersed African American communities loosely connected by the James River.

This indicates that the Legislature most likely used the James River as a means to bypass white communities to connect predominantly African American populations in Norfolk, Newport News and Hampton with African American populations in the Richmond and Petersburg areas. *See id.* The District Court correctly found that the Legislature's decision to use a legal loophole to create the appearance of contiguity is just further evidence that "the district's boundaries were drawn with a focus on race." *Id.*

Finally, the Third Congressional District divides an excessive number of political subdivisions. As the District Court correctly found, the Third Congressional District splits more local political boundaries and more voting tabulation districts than any other district in Virginia. *Id.* at 27a. As a result of the multitude of splits of political subdivisions, the 2012 Redistricting Plan moved over 180,000 people in and out of the Third Congressional District. Notably, "the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African American." *Id.* (citing Trial Tr. 87 at 81:21-82:6). Thus, an analysis of the political subdivisions of Virginia provides further circumstantial evidence that the boundaries of the Third Congressional District were drawn as a racial gerrymander.

While these objective geographic factors are substantial evidence that race was the predominant factor motivating the Legislature's redistricting plan, *see Shaw*, 509 U.S. at 646-47 ("[A] reapportionment

plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregat[e] . . . voters on the basis of race") (internal quotation marks omitted), the legislative history in this case only bolsters Appellees' claim. Appellants' statements and the statements of the author of the 2012 Redistricting Plan support the conclusion that race predominated the 2012 Redistricting Plan. *See* J.S. App. at 17a-23a.

The District Court correctly held that there is overwhelming evidence that traditional districting criteria were subordinated to race in this case. *See* J.S. App. at 30a.

B. The District Court's Finding that Race Rather than Politics Predominated was Supported by Substantial Evidence and Was Not Clearly Erroneous.

The Appellees established a prima facie case that traditional districting principles were subordinated to race. Unable to refute this showing, Appellants defended the redistricting plan by contending that it was predominantly motivated by partisan politics, not race. *Id.* ("While Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District, they submit that a desire to protect Republican incumbents explains the District's shape."). The District Court rejected that explanation, finding that "less was done to further the goal of incumbency protection than to

increase the proportion of minorities within the district." *Id.* at 32a. Appellants cannot demonstrate that the District Court's rejection of that explanation was clearly erroneous, especially when Delegate Janis, the "architect" of the 2012 Redistricting Plan, categorically denied under oath that partisan politics was a factor in his plan. Thus, when asked whether politics played a role in the formulation of his plan, Delegate Janis testified: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." J.A. at 456.

Moreover, even if the Appellants had a substantial basis for their contention that this case is a "mixed motive suit," in which a state's conceded goal of "produc[ing] majority-minority districts," was accompanied by "other goals, particularly incumbency protection," that would not immunize the Legislature's districting decisions. *Bush*, 517 U.S. at 959. Race can still be a *predominant* factor in the drawing of a district, without the districting revisions being "purely race-based." *Id.* (emphasis omitted). Indeed, the Supreme Court has observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." *Shaw II*, 517 U.S. at 907.

Appellants' reliance on *Cromartie II* is misplaced. While the record in this case established that politics was not a factor in the 2012 Redistricting Plan, the

record in *Cromartie II* indicated that partisanship was a driving factor. *See Cromartie II*, 532 U.S. at 242; *see also* J.S. App. at 33a. Appellants also mistakenly rely on *Cromartie II*'s statement that "the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina," *id.* at 243, somehow prevented the District Court from finding that the Third Congressional District's design was motivated predominantly by race. Thus, Appellants argue that the increase in the Third Congressional District's black voting age population simply mirrored the increase in its Democratic vote share, and reflected a purely partisan motivation. *See* Brief for Appellants at 36, *Wittman v. Personhuballah*, (2015) (No. 14-1504).

Cromartie II did not create a *per se* rule that there can be no finding of racial gerrymandering where a racial minority tends to vote more regularly for one political party or another. *Cromartie II* merely observed that African Americans in North Carolina vote Democratic between 95 percent and 97 percent of the time, and reasoned that, "[a] legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature *may*, by placing reliable Democratic precincts within a district without regard to race, *end up* with a district containing more heavily African American precincts, but the reasons would be political rather than racial." *Id.* at 245 (emphasis added). In other words, by focusing on *partisan* concerns, a state legislature may *incidentally* create a majority-minority district. If that is what the evidence had shown, then the rationale for the

creation of such a district would be political rather than racial. But the extensive record evidence here, particularly the statement of the redistricting's prime architect that he did not take partisan factors into consideration, establishes that race was the predominant consideration, if not the only consideration, in drawing the Third Congressional District.

Substantial evidence supported the District Court's conclusion that the intent behind the 2012 Redistricting Plan in creating the Third Congressional District was *not* predominantly political.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision.

Respectfully submitted,

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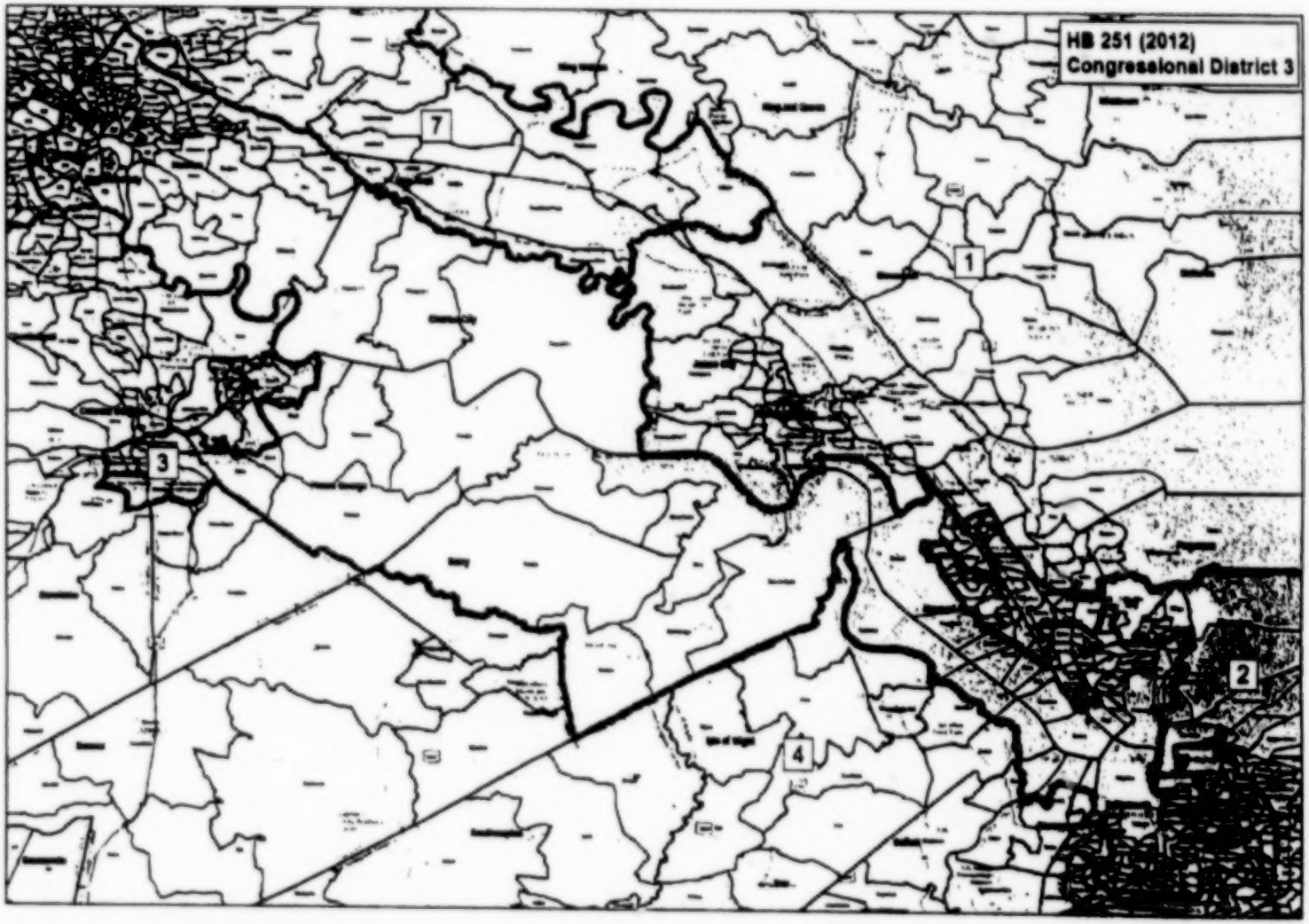
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APPENDIX

APPENDIX A



Source: *Current District Maps*, VIRGINIA.GOV, http://redistricting.dls.virginia.gov/2010/Data/2012CongMaps/HB251%20-%20Congress%203.pdf (last visited January 28, 2016).